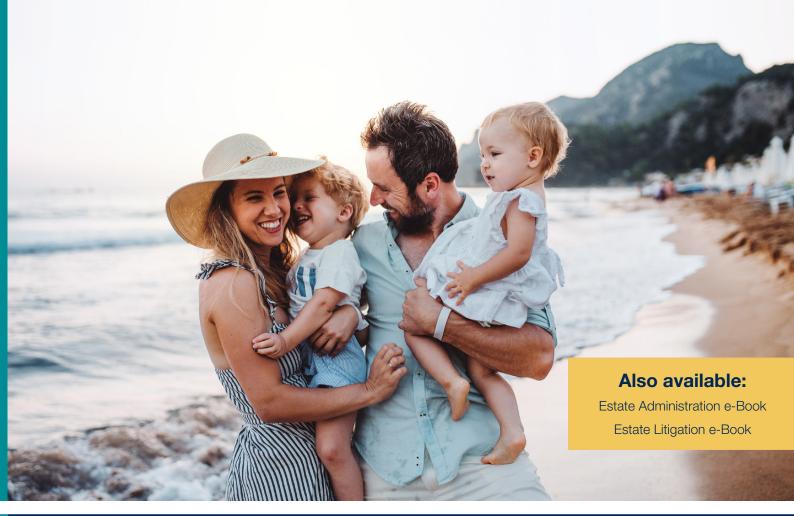
| Thynne | Macartney

Estate Planning e-Book

November 2022



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Helping you plan for the future

Planning for the future can be daunting but it is the best course of action to make sure you protect the interests of your loved ones. With more than 50 years' experience across Thynne + Macartney's Wills + Estates team, we understand that every client's circumstances are unique and we will work with you to find the best options for securing your assets and your future wishes.

Offering the choice of in person (whether in our office, at your home or place of business) or an online service for your estate planning, when it is time to take care of the future of your loved ones, we're with you.

Making your Will

A Will ensures that your estate will pass to your intended beneficiaries. It is inadvisable to try to write your own Will unless you have the necessary legal training to do so. Drafting your own Will can give rise to disputes which require court proceedings to resolve.

Executors and trustees

The executor and trustee administers your estate following your death by:

- collecting your assets;
- paying any debts you may have; and
- distributing your estate in accordance with your Will.

When choosing your executor and trustee, you might consider appointing:

- family members or close friends;
- trusted advisers such as your lawyer and/or accountant;
- the Public Trustee; or
- a private trustee company.

You can have up to four executors.

Executors must act unanimously, so should have a reasonable working relationship.

Beneficiaries

A beneficiary is a person listed in your Will to receive a benefit from your estate.

A beneficiary may be a specific beneficiary, where a specific asset is left to that person, or they may be a residuary beneficiary who is entitled to a share in the residuary of an estate.

Guardians

The role of a guardian is to bring up an infant child until they reach adulthood at 18 if both biological parents have died.

It is important to consider the age of a prospective guardian, as well as their views in relation to topics such as education and religion, and their own personal and family situations.

You should check with your chosen guardians if they are willing and able to act if required.

Final wishes

If you have any particular wishes regarding your funeral or organ donation, we recommend that you include a clause in your Will specifying those wishes.

Funeral: Recording your wishes for either a burial or cremation, and the location, religious denomination or content of your funeral service.

Organ donation: You may choose to put a clause in your Will expressly stating that you are an organ donor, or that you do not consent to being an organ donor, or that you only want your body or organs to be used for a particular purpose.

You should also register your wishes through the Australia Organ Donor Register if you wish to donate your organs.

Gifts

Things to consider:

- You may wish to make one or more specific gifts in your Will;
- Your Will should also contain a gift of the residue of your estate;
- You should consider what happens to gifts if a beneficiary fails to survive you; and
- With an increase in the value of estates, the breakdown of relationships and beneficiaries engaged in high risk professions, testamentary trusts are becoming increasingly relevant.

Trusts and superannuation

A testamentary trust allows an inheritance to be kept separate from the personal assets of a beneficiary and can provide benefits in terms of asset protection.

A testamentary trust also offers tax advantages for distributions of income generated by the trust.

Under superannuation legislation, the trustee can distribute your superannuation to your estate, or to any surviving spouse, children or dependants, or a combination of these.

It may be appropriate to put in place a binding death benefit nomination so that you can be certain that your superannuation will be dealt with in the way you want.

For family trusts and self-managed superannuation funds, you can seek to ensure that the right people succeed you as the trustees of these entities.

You may also wish to consider how any debts owed to you by your family trust, including any unpaid entitlements, should be dealt with in the event of your death.

Ongoing business arrangements

If you own a business, you will need to consider how your interest in this enterprise will be dealt with upon your death, including:

- Would you want your executor/s and trustee/s to continue to run the business, sell it, or wind it up?
- If you want your executor/s and trustee/s to continue to run the business, do they have the necessary knowledge and expertise?
- Is there a particular person to whom you would like to leave your interest in the business?

If you are a partnership, depending on the circumstances, you may wish to consider an agreement setting out what is to occur should one of you die.

Thynne + Macartney offers a safe custody service to keep your Will and estate documents for safekeeping.

This service is free of charge and makes it easy for your executor to locate the Will when needed.



Letter of wishes

A letter of wishes is not a legally binding document. It lets you express wishes or preferences on issues which are important to you, to guide your executors and trustees in the administration and distribution of your estate.

Although it is not a legally binding document, you can, in a letter of wishes, express your preferences about issues such as who receives particular items, which assets should be sold or given to beneficiaries and how beneficiaries use their inheritance.

Other matters you can include in a letter of wishes are mentioned below.

Arrangements for your funeral

If you have any particular wishes regarding your funeral, we recommend that you include them in your letter of wishes.

This could include a statement of your wishes regarding burial or cremation, or the location, religious denomination and content of your funeral service.

Organ donation

If you have any particular wishes regarding organ donation, you should consider specifying those wishes.

This might involve expressly stating that you do not want to be an organ donor, or that you are an organ donor, or that you only want your body or organs to be used for particular purposes.

You should also register your wishes through the Australia Organ Donor Register if you wish to donate your organs.

Guardianship of minor children

While the guardian/s appointed in your Will would ultimately have the final say in how your children are looked after if you die before they reach adulthood, you can specify your wishes as to their maintenance, education and advancement in a letter of wishes.

Control of trusts and self-managed super funds

Your letter of wishes can also set out your preferences as to how you would like your family trust or self-managed superannuation fund to be managed following your death.



Testamentary trust

A testamentary trust is a trust established by your Will and therefore does not come into effect until after your death. A properly documented testamentary trust can be an effective estate planning tool.

Why should I use testamentary trusts?

1. Protection from attack

Testamentary trusts can protect inheritances, to some extent, from attack by third parties.

For instance, where assets are gifted directly to a beneficiary:

- if the beneficiary separates from his or her spouse, then the inherited assets could be attacked by the spouse in the course of property settlement proceedings; and
- if the beneficiary becomes bankrupt, the inherited assets can be attacked by the beneficiary's trustee in bankruptcy for the purpose of paying creditors.

These issues would not arise if an inheritance was placed in a testamentary trust, as the inheritance is controlled by trustees, and is kept separate from the personal assets of the beneficiary, providing the inheritance with a degree of protection from attack by third parties.

Examples:

Family law proceedings

The assets of the testamentary trust do not usually form part of the matrimonial assets which are to be divided between the parties. The existence of the testamentary trust can be taken into account in arriving at a property settlement, but generally only as a resource available to the beneficiary – the assets within the testamentary trust are usually immune from a direct attack by the beneficiary's spouse.

Bankruptcy proceedings

Assets held in the testamentary trust do not usually form part of the beneficiary's personal assets which are available for division amongst his or her creditors.

2. Protection of inheritances from waste

A testamentary trust also provides a mechanism by which inheritances can be protected against being squandered by beneficiaries.

When an inheritance is left to a testamentary trust, the trustees exercise control over how much, when, and for what purpose income and capital is distributed to the beneficiary.

The testamentary trust can be documented so that it runs until the beneficiaries reach a particular age or when they satisfy certain conditions, before the testamentary trust can be wound up.

In short, a testamentary trust can provide for the needs of beneficiaries for maintenance, education and advancement while they are young, while delaying absolute control of the inheritance until they have matured and gained life experience.

3. Tax advantages

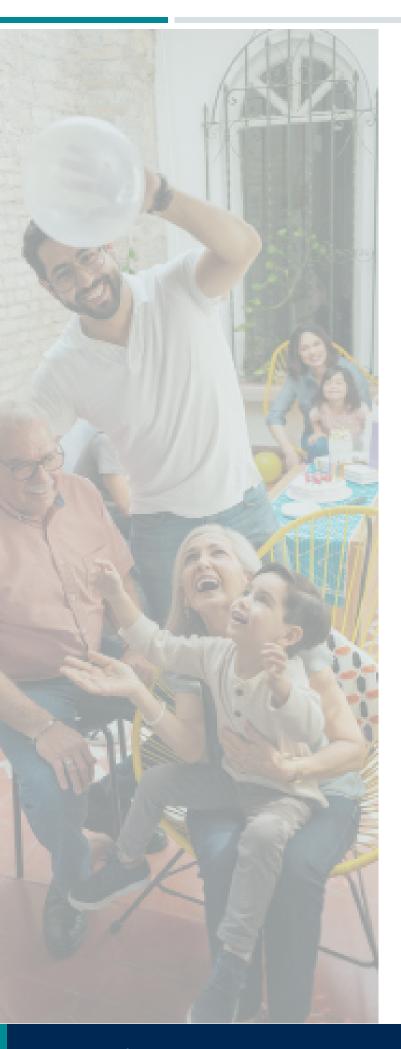
A testamentary trust can also provide significant tax advantages compared to other trust structures, especially where there are minor beneficiaries.

Example:

In the case of a family discretionary trust established during your lifetime, tax legislation allows only a small amount of income (currently \$416 per annum) to be distributed to a minor beneficiary tax-free, and over that any further income is taxed at the highest marginal rate.

However, in the case of a testamentary trust, each minor beneficiary is treated as an adult for tax purposes.

This means that each minor beneficiary has the benefit of the usual adult tax-free threshold so income distributed to a minor beneficiary below this threshold will not be subject to tax.



Any income distributed to a minor beneficiary above the tax-free threshold from a testamentary trust is taxed at normal marginal rates, rather than at the highest marginal rate.

Therefore, by splitting the income of a testamentary trust between beneficiaries, a family can minimise tax.

What are the potential disadvantages of testamentary trusts?

1. Control

In order to obtain the maximum possible asset protection advantages from a testamentary trust, it must be carefully documented.

For example, there should be at least two trustees at all times.

If there is only one trustee (who is also a beneficiary), then it could be argued that he or she has sole control of the testamentary trust, and as such has the ability to distribute the income and capital to himself or herself.

There have been family law and bankruptcy cases where property held in such trusts has been successfully attacked by third parties on the basis that they appear to be a discretionary trust. However, this is an illusion. The trust is actually under the sole control of a trustee who is also a beneficiary.

2. Costs

The ongoing operation of a testamentary trust involves a reasonable degree of administration, similar to that of a family discretionary trust, with recourse to accountants, financial planners and lawyers as required.

This all involves a cost.

3. Taxation and transfer duty

Distributions of assets other than cash from a testamentary trust to a beneficiary can have unintended tax and transfer duty consequences.

If you intend that a particular asset (other than cash) should ultimately be held directly by a beneficiary, it may be most cost effective to leave that asset to the beneficiary absolutely in your Will.

Summary

A Will incorporating a testamentary trust can be a useful estate planning tool but is a complex document that should be prepared by a suitably qualified and experienced lawyer.

Enduring Power of Attorney

By making an Enduring Power of Attorney (EPA), you can appoint people of your choice to look after your affairs in certain circumstances including where you lose the capacity to make decisions for yourself.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney allows you to appoint one or more people to make decisions on your behalf.

"Enduring" means that the power of the persons appointed continues even if you lose the capacity to make decisions for yourself.

Why make an Enduring Power of Attorney?

If you do not have an Enduring Power of Attorney, and you lose capacity, an application may need to be made to the Queensland Civil and Administrative Tribunal for the appointment of an administrator for your financial affairs and a guardian to look after your personal/health affairs.

This could be a lengthy and expensive process, and it might result in people being appointed whom you would not have chosen.

How many attorneys can I appoint?

You can appoint more than one and direct them to act:

- jointly (in which case they must all agree);
- severally (in which case any attorney can make a decision);
- by majority (eg a two-thirds majority); or
- successively (eg the power of your second attorney only begins if your first attorney dies, loses capacity, becomes bankrupt or is out of the country); or
- in any combination.

Whom should I appoint?

Your choice of attorney is up to you. However, as examples, your attorney could be your spouse or an adult child, a close friend or other relative, or a trusted adviser such as your lawyer or accountant.

What type of decisions can attorneys make on my behalf?

You can give your attorneys power to act on your behalf in relation to:

- financial matters only;
- personal/health matters only; and
- both financial and personal/health matters.

If you wish, you can appoint one or more attorneys who will act in relation to financial matters only and one or more separate attorneys to act in relation to personal/health matters only.

When does a power of attorney commence and end?

Personal/health matters

The power of your attorneys in relation to personal/ health matters will only begin when you lose the capacity to make decisions on such matters for yourself and continues only so long as you lack capacity.

Financial matters

You can choose when the power of your attorneys in relation to financial matters will begin, either immediately on the execution of the document or on a particular date or at the happening of a particular event.

You can change or revoke your Enduring Power of Attorney at any time when you have capacity.

Depending on the terms of an Enduring Power of Attorney, it may be revoked to some extent if you marry, enter into a registered relationship or divorce, or upon the withdrawal, incapacity, bankruptcy or death of your attorney.

The Enduring Power of Attorney terminates on your death.

What are personal/health matters?

Some examples are:

- · deciding where and with whom you live;
- whether you work and if so, with whom;
- day-to-day matters such as diet and dress;
- decisions about your medical and dental treatment: and
- acting on your behalf in relation to legal matters which do not concern your property or finances.

What decisions are they unable to make?

There are certain matters in relation to which your attorneys cannot make decisions on your behalf.

These include special personal matters, such as decisions about your Will, voting in elections, marriage and adoption, and special health matters, such as organ donation and participation in medical research or experimental health care.

What are financial matters?

Some examples are:

- operating your bank accounts;
- deciding how your investments should be managed;
- paying your bills;
- buying or selling property on your behalf;
- carrying on a business operated by you;
- insuring and otherwise protecting and preserving your property; and
- acting on your behalf in relation to legal proceedings concerning your property.



Advance Health Directive

An Advance Health Directive (AHD) records your wishes and makes directions regarding your future health care if you lose the capacity to make decisions for yourself.

What is an Advance Health Directive?

An Advance Health Directive is a document setting out directions and wishes regarding the treatment you will receive for various medical conditions if you are unable to make and communicate decisions for yourself.

It can give specific and specialised instructions about particular health treatments.

Why make an Advance Health Directive?

If you lose the capacity to make health care decisions for yourself and do not have an Advance Health Directive, then your attorney or guardian would make decisions as to the type of care and treatment you receive.

This might result in you receiving care and treatment which is different from that which you would have chosen.

What do I need to consider?

- What sort of medical treatment you want to receive if you become ill and lose the ability to make or communicate decisions for yourself about your medical treatment.
- If medical treatment could prolong your life, what level of quality of life would be acceptable to you?
- Do you have any religious beliefs that might affect the treatment you want to receive?
- What sort of treatment would you want to receive if you are suffering from a terminal, incurable or irreversible illness or condition?
- In the document you can nominate whether or not you require, for example, blood transfers, artificial ventilation and nutrition, or resuscitation.

You should discuss the terms of your Advance Health Directive with your lawyer, your doctor, your attorneys, and your family and friends.

As part of the process of making an Advance Health Directive, your doctor must sign a statement confirming that he or she has discussed your Advance Health Directive with you and that you understand its nature and effect.

We recommend that you review your Advance Health Directive regularly to ensure that it continues to reflect your wishes.

When does an Advance Health Directive commence and end?

Your Advance Health Directive will only commence when, if ever, you lose the capacity to make decisions on health matters for yourself, and continues only so long as you lack that capacity.

You can change or revoke your Advance Health Directive at any time when you are mentally capable of doing so.

START OR UPDATE PLANNING FOR YOUR ESTATE

Visit our website to use our online drafting and information gathering tool.

You will be ahead in your planning and it will be the most cost effective way for you to ensure your loved ones and assets are protected in the future.

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Thynne Macartney

Superannuation payments

A payment made from your superannuation fund after your death is called a "death benefit". The payment of death benefits is determined by applicable legislation and the rules of the fund – not necessarily by your Will.

Many people direct how their property is to pass under their Will and assume that their superannuation will follow in the same way.

However, this assumption is incorrect.

A payment made from your superannuation fund after your death is called a "death benefit".

The payment of death benefits from a superannuation fund is determined in accordance with applicable legislation and the governing rules of the fund, not necessarily the terms of your Will.

The trustee of the superannuation fund is bound to deal with a deceased member's superannuation benefits in the best interests of the member.

The trustee will typically make enquiries about the deceased member's family and dependants, any relevant provisions in the Will and any other relevant circumstances before deciding as to how the death benefit should be distributed.

Can you direct the trustee?

The legislation governing the management of superannuation funds permits you, subject to any limitations in the governing rules of your superannuation fund, to execute a written notice which binds the trustee of the superannuation fund to distribute your superannuation in a particular way in the event of your death.

These notices are called binding death benefit nominations (**BDBNs**).

A BDBN directs the trustee to pay your superannuation benefits to your dependants and/or your estate in the proportions chosen by you in the event of your death.

If the BDBN is valid at the date of your death, the trustee must pay the superannuation monies to the beneficiaries nominated in the proportions set out in the BDBN.

How long does a BDBN remain effective?

You should check the duration of a BDBN with your superannuation fund.

Under the terms of some superannuation fund trust deeds, a BDBN only remains valid for between 1-3 years from the date of signing, after which time it lapses.

Some other superannuation fund trust deeds provide that a BDBN remains valid until it is altered or revoked.

It is important to be aware that a BDBN does not necessarily remain in effect indefinitely. You should check the duration of a BDBN with your superannuation fund if you are considering making one.

Do you need a BDBN?

Whether a BDBN is appropriate and, if so, the most appropriate people to nominate, will depend on your personal circumstances.

It is important to be aware that there can be adverse tax implications in making a BDBN – you should ensure that you understand these tax implications before deciding to make a BDBN.

Further, it is important to review your BDBN regularly and update it if necessary, as unintended consequences can result if your circumstances or the circumstances of any of your intended beneficiaries change and an outdated BDBN remains in place on your death.

Who can benefit under a BDBN?

Subject to limited exceptions, your death benefits must be distributed to one or more of your dependants, or your legal personal representative (that is, the executor of your Will).

"Dependants" include:

- spouses (including de facto spouses);
- children (including stepchildren, adopted children, foster children and wards);
- any person who was in an interdependency relationship with the deceased at the date of his/ her death; and
- any other person (irrespective of age) who is in any way financially dependent on the deceased.

If you nominate your legal personal representative (your executor) in a BDBN, your superannuation benefits will be paid to your estate and will be distributed in accordance with the terms of your Will, if you have one, or in accordance with the laws of intestacy, if you do not.

There is no limit to the number of persons who may be nominated in a BDBN. The only restriction is that the various percentages applied to each dependant and, if nominated, your legal personal representative, should add up to 100%.

How is superannuation dealt with on death?

Your letter of wishes can also set out your preferences as to how you would like your family trust or self-managed superannuation fund to be managed following your death.

As the trustee makes the decision regarding distribution of the death benefits, there have been many cases where disputes have arisen because one or more family members or dependants disagree with the trustee's decision, leading to lengthy and expensive proceedings to resolve the issues.



Safekeeping of documents

It does not end at creating and/or updating your Will and estate plan. To ensure your loved ones are taken care of, you need to make sure these documents are safeguarded.

Once you create and update your Will and estate plan, you need to take steps to safe guard your documents to ensure that your loved ones are taken care of in a manner you see fit when you are no longer with them.

Securing the whereabouts of these documents will assist executor/s with administering your estate.

It is essential that you advise your family and/ or trusted individuals with the location of your Will and estate documents, should they need to access it.

Ways to secure your Will and estate plan documents

1. Safe custody with Thynne + Macartney

Secure your original Will with us. Thynne + Macartney offer a safe custody service to keep your Will and estate documents for safekeeping.

This service is free of charge and makes it easy for your executor to locate the Will when needed.

2. At home

Place a copy of your Will and estate documents in your home safe.

Ensure your family know of its location and provide the combination or a copy of the key to the safe to a trusted individual.

3. In a safety deposit box at a bank, private storage facility or vault

Many banks and private storage facilities and vaults offer a variety of safe custody services for important documents.

Fees may apply.



Estate planning checklist

Providing us with this completed checklist together with the information requested will assist to streamline the estate planning process and minimise costs.

If any of the categories set out below are not relevant to your circumstances, please tick the "N/A" column in relation to that category.

Information requested	Provided	N/A
Personal information		
A summary of your personal details (eg your full name, date of birth, occupation, address, telephone number and email address)		
A copy of your current Will (if any)		
A copy of your current Enduring Power of Attorney (if any)		
A copy of your current Advance Health Directive (if any)		
Personal details of your spouse or partner, children, financial dependents and grandchildren (names, ages, occupations, addresses and telephone numbers) and their life circumstances (eg married, in a relationship, single divorced, financial position etc)	;	
Details of your accountant and/or financial advisor (if any)		
Details of your assets and liabilities		
Details of the nature and estimated value of your assets (eg real estate, bank accounts, shares, motor vehicles, household contents etc)		
Details of the nature and value of your debts (eg home loans, car loans, personal loans, margin loans, credit cards etc)		
Details of companies		
Details of any family companies in which you have an interest (eg name of the company, director/s and shareholder/s) together with, for each company, copies of:		
a) the annual company statement;		
b) the company constitution;		
c) the most recent financial statements for the company; and		
d) any shareholders agreement or business succession agreement that in place.	at is	
Details of trusts		
Details of any trusts, whether discretionary, fixed or unit trusts, in which you have an interest (eg name of the trust, trustee/s, appointor/s and beneficiary/ies) together with, for each trust, copies of:		
a) the trust deed and any deeds of variation; and		
b) the most recent financial statements for the trust.		

Information requested	Provided	N/A
Details of partnership		
Details of any partnerships in which you have an interest (eg name of the partnership and details of each partner) together with, for each partnership, copies of:		
a) the partnership agreement (if applicable); and		
b) the most recent financial statements for the partnership.		
Details of superannuation		
Details of your interests in any industry superannuation funds (eg name of the fund and membership number), together with, for each fund, a copy of your most recent member statement showing the balance of your entitlements and details of any binding or non-binding death benefit nomination.		
Details of any self-managed superannuation fund in which you have an interest (eg the name of the fund and the members) together with, for each fund, copies of:		
a) the superannuation fund trust deed and any deeds of variation;		
b) the most recent financial statements for the fund showing the balance of your entitlements; and		
c) any binding or non-binding death benefit nomination.		
Details of life insurance		
Details of any life insurance policies you hold, together with, for each policy, a copy of the insurance policy and schedule together with details of any nominated beneficiary/ies.		
Details for your Will		
Details of the proposed executor/s and trustee/s of your Will (eg name/s, address/es, telephone number/s etc)		
Details of any directions you wish to make regarding your funeral arrangements (eg burial or cremation, any funeral plan, organ donation etc)		
If you have minor children, details of the proposed guardian/s for those children (eg name/s, address/es, telephone number/s etc)		
Details of the proposed gifts to be included in your Will (eg description of the property, name of intended beneficiary, nature of your relationship to the beneficiary etc)		
Details for your Enduring Power of Attorney (EPA)		
Details of your proposed attorney/s (eg name/s, address/es, telephone number/s etc)		
Details of any wishes or directions you would like to include in your EPA		
Safekeeping of documents		
The safekeeping of your Will and estate documents		

Contact us



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An accredited specialist in succession law, I have over 12 years' experience in all areas of estate litigation, estate planning, estate administration and I lead Thynne + Macartney's Wills + Estates team. By providing practical and commercial advice and solutions to my clients and work closely with them their trusted advisers to achieve their desired outcomes in an efficient way.

I am empathetic to my clients' individual situations and assist them to navigate through what can often be a difficult time in their lives.



CATHY PICCOLO Special Counsel

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During my extensive career I have worked within the areas of estate planning, administration and litigation. My 30 years as a lawyer has led me to develop a large range of knowledge within Wills + Estates and helps me prepare for all eventuating circumstances.

When things don't go to plan I am quick to assist clients in making a claim pursuant to family provision applications, as well as defend claims against estates. I also understand the impact unintended consequences can have on individuals and families when the intentions of the deceased are unclear or inadequate.



VICKY MARTIN
Senior Associate

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With more than 30 years' experience working in the legal industry, I have the knowledge and skill to interpret the complexities of the law and deliver workable solutions to clients. While studying law, I worked at one of Queensland's leading Wills and estates law firms where I gained extensive experience and knowledge which helps me guide clients through challenging times in their lives.

I help clients understand the most appropriate estate plan for their situation and then prepare their Wills, Enduring Power of Attorneys, Advance Health Directives, Binding Death Benefit Nominations and all other documents needed for their estate plan.



STEPHANIE SAINT JAMES Associate

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As a Wills and Estates practitioner, I combine my experience with a practical commercial approach to achieve the best possible outcomes for clients in estate planning, administration, and litigation matters.

I am particularly interested in preserving clients' final wishes in order to ensure that their estate planning strategy accurately reflects their intentions and family circumstances. During my eight years of experience, I have seen first-hand how effective estate planning and administration can reduce or eliminate disputes and litigation.

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About Thynne + Macartney

Thynne + Macartney is a proud Queensland commercial law firm which began in 1893.

Our founding Partners, Andrew Thynne and Edward Macartney, were instrumental in the development of Queensland.

With offices in Brisbane and Cairns, we also have a long standing regular visitation program to regional centres in Queensland to help our clients in rural and more remote areas.

Our industry leading teams and lawyers are what sets us apart. Our lawyers have been independently recognised by:

- Best Lawyers Australia
- Doyle's Guide
- Lawyers Weekly
- Chambers Asia-Pacific

Five of our senior lawyers are recognised by the Queensland Law Society as accredited specialists in their field of business law, succession and family law, and property law.

A commitment to social enterprise and the communities in which Thynne + Macartney works is part of our DNA and has been since the firm began. That investment continues today and is something everybody who works at Thynne + Macartney is very proud of and it has been recognised independently by several organisations. Since 2016, we have partnered with the Gallipoli Medical Research Foundation to facilitate medical research to prevent, cure or lessen the impact of diseases affecting the veteran and broader Australian community.

Proud of our history, excited by our future.

Thynne + Macartney - we're with you.

Our expertise

- Agribusiness
- Banking + Finance
- Body Corporate + Strata Title
- Building + Construction
- Business + Corporate
- Development
- Employment
- Family
- Finance + Investment
- Funds Management
- Insolvency + Restructuring
- Insurance
- Intellectual Property
- Litigation + Dispute Resolution

- Local Government
- Maritime + Transport
- Native Title
- Planning + Environment
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- Professional Indemnity
- Property
- Not For Profit
- Retail Leasing
- Retirement Living
- Schools + Education
- Tax + Revenue
- Technology
- Wills + Estates



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